IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

WP(C).No. 22990 of 2006(J)

OS.1418/2004 of I ADDL.M.C.,ERNAKULAM

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PETITIONER:

FCI TECHNOLOGY SERVICES LIMITED,
A COMPANY INCORPORATED UNDER THE COMPANIES ACT,
1956 AND HAVING ITS REGISTERED OFFICE AT
THAIKOODAM, VYTTILA, KOCHI-682 019, REPRESENTED
BY ITS DIRECTOR, MR. K.V.SIVADAS.

BY ADV. SRI.ANTONY DOMINIC
SRI.A.M.SHAFFIQUE
SRI.E.K.NANDAKUMAR
SRI.A.K.JAYASANKAR NAMBIAR
SRI.NITHIN GEORGE

RESPONDENTS:

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1. HANOSH K. RAM, S/O. K.P.RAMANKUTTY,
KUNJAN MALAYIL HOUSE, MANEED P.O., PIRAVOM.

2. K.P.RAMANKUTTY, S/O. LATE PARAMU,
KUNJAN MALAYIL HOUSE, MANEED P.O.,
PIRAVOM.

BY ADV. SRI.C.R.SIVAKUMAR
SRI.SANTHOSH PETER (MAMALAYIL)

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 28/11/2006, ALONG WITH WPC NOS.22991/06 & 22992/06
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX:

EXT.P1: COPY OF PLAINT FILED BY PETITIONER BEFORE MUNSIFF COURT ON 9/9/04

EXT.P2: COPY OF PROOF AFFIDAVIT FILED BY PETITIONER BEFORE MUNSIFF COURT ON 1/8/06

EXT.P3: COPY OF AGREEMENT EXECUTED BY PETITIONER AND DEFENDANT DT.1/10/2004

EXT.P4: COPY OF ORDER PASSED THE MUNSIFF'S COURT DT.18/8/06

//True copy//

SHW TO JUDGE.

M.SASIDHARAN NAMBIAR,J.

W.P.(C) .NOs. 22990, 22991 & 22992 OF 2006

Dated 28th November 2006

JUDGMENT

Petitioner is one and the same in all the three writ petitions. Petitioner company is the plaintiff in O.S.Nos.1418/04, 1467/04 and 1593/04 respectively on the file of Munsiff court, Ernakulam. Question to be decided in all the petitions is whether the instrument purporting to be an agreement jointly executed by petitioner and respondents, is a bond or an agreement. Trial court under Ext.P4 order held that it is a bond and not an agreement and therefore stamp duty is to be paid as it is a bond otherwise document is to be impounded as provided under Section 37 of Kerala Stamp Act. Petitioner is challenged that order contending that instrument is not a bond but an agreement.

2. Learned counsel appearing for petitioner and respondents/defendants in the suits were heard.

3. Argument of learned counsel appearing for petitioner is that Ext.P3, instruments in all the

cases are agreements and not bond. The agreement was that the instrument does not create an obligation to pay money and instead only creates an obligation to pay liquidated damages and irrespective of the amount fixed as liquidated damages, plaintiff will be entitled to only the actual loss suffered as provided under Section 73 and 74 of Contract Act and therefore the instrument is only an agreement and not a bond. Arguments of learned counsel appearing for respondents was that as the instrument creates an obligation to pay a fixed sums on the failure to continue the employment, under the instrument, it is not an agreement but is a bond.

4. Bond has been defined under section 2(a) of the Kerala Stamp Act as follows.

> "(a) bond includes-
>
> (i) any instrument whereby a person obliges himself to pay money to another, on conditions that the obligation shall be void if a specified Act is performed, or is not performed as the case may be;
>
> (ii) any instrument attested by a witness and not payable to order or bearer, whereby a person obliges himself to pay money to another; and

> (iii) any instrument so attested, whereby a person obliges himself to deliver grain or other agricultural produce to another;"

Distinction between bond and agreement is that bond creates an obligation to pay money which is not a pre-existing obligation. If the amount claimed in the instrument is a pre-existing obligation and can be sued without the aid of that instrument it is only an agreement and not a bond.

5. As per distinction of bond, if by that instrument a person is obliged himself to pay money on condition that obligation shall be void if a specific act is performed or is not performed, as the case may be, it is a bond. Apex court in **State of Kerala v. McDowell & Co. Ltd. (1994 (1) KLT 802 (SC))** construing the definition of the bond in the Kerala Stamp Act as follows;

> "In our view, the definition of bond in sub-clause (1) of clause (a) of S.2 of the Kerala Stamp Act is clear and unambiguous. It must be read as it stands, nothing may be read

> in or implied. The word 'whereby' must be read as meaning what it ordinarily does, namely, 'by which'. An instrument, therefore, by which a person puts himself under an obligation to pay a sum of money to another on condition that the obligation shall be void if some specific act is, or is not, performed is a bond. The only question to pose is, has the executant of the instrument put himself under an obligation, or bound himself, to pay a sum of money to another, the obligation to be void under specified circumstances? If the executant can be sued for that sum of money only upon the strength of the instrument, the instrument is a bond."

6. Arguments of learned counsel appearing for respondent was that if respondents continued their employment under the petitioner, the amount named in the instrument need not be paid and therefore the obligation to pay the amount was created under the document specifically providing that the provision to pay will be void, if the specified act of employment

is performed and therefore it is a bond and not an agreement.

7. The crucial question is whether the instrument creates an obligation to pay "money" as provided under Section 2(a) of Kerala Stamp Act. The relevant clause in all Ext.P3 instrument reads;

> "3. In case the bounden commits a breach of, or fails to fulfil any of the conditions or obligation herein his part contained the bounden shall pay to the company a sum of Rs.1,00,000/- (Rupees One lakh only) by way of liquidated damages."

The instrument creates an obligation to pay to the petitioner company, the amount named in the instrument as liquidated damages. The obligation to pay created is not money as such but the liquidated damages, The payment of liquidated damages cannot be taken as an obligation to pay the money. As provided under Section 74 of the Contract Act, petitioner is entitled to the liquidated damages, But the stipulation could only be taken as an obligation to pay the compensation for the actual loss suffered and not the liquidated damages

stipulated in the instrument. If so it cannot be treated as an obligation to pay the money named in the instrument. The crucial question is whether an obligation to pay liquidated damages could be termed as an obligation to pay money as defined under Section 2(a) of Kerala Stamp Act.

8. A learned Single Judge of this court in **West Coast Eletroplating Co. Ltd v. Sreedharan (1971 KLT 383)** has considered the question whether a provision for recovery of damages in the event of a breach would make the instrument a bond. It was held ,

> "The distinction between an obligation under a 'bond' and an obligation under an ordinary contract is that a breach of an obligation under a bond does not 'sound in damages' whereas 'damages' is what one who breaks an ordinary contract is subjected to."

9. In the instrument under consideration there is a provision for payment or recovery of damages in the event of a breach to continue the employment. The provision is not valid in the event of the

performance of continuation of the employment Hence the provision to pay the liquidated damages depends on the breach of performance of the obligation.

10. Even though a fixed amount has been quantified as liquidated damages in the instrument for payment in the event of breach of that covenant, as provided under Sections 73 and 74 of Contract Act, plaintiff is not entitled to realise the named amount, if no loss has been sustained. Therefore the payment of a fixed amount shown as liquidated damages in the instrument by itself does not create an obligation to pay that much amount to petitioner. The quantum payable for the breach certainly depends on the loss sustained by petitioner. If that be so, the obligation to pay the sum named as liquidated damages in the instrument cannot be treated as an obligation to pay money. It could only be taken as an obligation to pay the named sum as liquidated damages and not an obligation to pay money as provided under Section 2(a) of Contract Act. In such circumstances, Ext.P3 cannot be treated as a bond as defined under Sect 2(a) of Kerala Stamp Act. It is only an agreement as defined under Indian Contract Act. The Stamp duty payable is only the one payable for an

agreement. As it was paid the instrument cannot be impounded as provided under Section 33 of Kerala Stamp Act. The finding to the contrary in Ext.P4 order is unsustainable.

Writ petition Nos.22990/06, 22991/06 and 22992/06 are allowed. Ext.P4 orders in all the petitions are quashed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.